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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]17

HENRY RANDALL WEBB, APPELLANT,

vs.

CAROLINE KING.

Argument in Behalf of Webb, Appellant.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 203.

HENRY RANDALL WEBB, EXECUTOR,

vs.

CAROLINE KING.

Argument for Appellant, Henry Randall Webb.

We venture to say that this is one of the most extraordinary cases that was ever brought to the attention of a court of justice. The complainant, a lessee, has broken her covenant (under penalty of forfeiture) to pay taxes on the demised premises. In consequence of this breach the property was, on April 13, 1899, for default in payment of taxes due in May, 1898, sold by the taxing power, and a deed in fee subsequently issued to the defendant Cohen for the benefit of the defendants Kann. Nevertheless, the lessee has succeeded in getting from a court of equity an injunction to prevent the lessor from retaking possession of the demised premises. She has also virtually enjoined the lessor from making a new lease to the purchasers of the tax title, who were willing to take the premises at an increased rental, and to surrender to the lessor the tax title. She has, also, in the same suit, successfully litigated the validity of this tax title with said purchasers, at the risk of the lessor, and has been relieved from the forfeiture.

Whether these things, or any of them, can properly be done is the question that now comes before this court.

This is a bill in equity, filed by Caroline King, complainant and assignee of a lessee, against Marianne A. B. Kennedy, lessor, Meyer Cohen, Sigmund Kann, and Louis Kann. Mrs. Kennedy having died, her attorney and devisee, Henry Randall Webb, and her heir at law, Maria Gillis Dewey, were, by bill of revivor, made parties defendant.

The facts of the case are these:

On July 8, 1890, Mrs. Marianne A. B. Kennedy, then about 69 years of age, leased premises numbered 719 Market Space in this city to the complainant's husband for three years. The rent reserved was $2,400 annually. In addition to this the lessee covenanted to pay all repairs and taxes under penalty of forfeiture. The lessee was at that time carrying on and continued to carry on a millinery business on Seventh street.

On December 27, 1892, this lease was extended for five years on the same terms.

On October 8, 1896, when Mrs. Kennedy was 75 years of age, this lease was extended for ten years, without any increase of rental.

The complainant admits in her bill that there has been a slight increase of rental value (Rec., p. 5.)

The proof is that the defendants Kann are willing to pay an increase of $1,200 yearly and also to pay taxes and repairs.

It is urged in the brief that this old lady, while not incompetent to contract, was nevertheless not on an equal footing with the lessee in these renewals, especially the last one, and was overreached by the lessee, and that therefore the lessee or his assignors are not entitled to the favorable consideration of a court of equity in again imposing upon the lessor an unequal burden from which the negligence of the lessee has discharged her.

In 1901 her memory had become so impaired that she forgot that up to the death of the original lessee she had herself paid the taxes and been reimbursed by him; she so informed her attorney, and on the faith of this he subsequently made a mistaken averment in this regard in his answer to the bill (Rec., p. 78).

The lessee urges as a special equity some improvements made during the lease upon the demised premises. These were apparently the taking away the old side entrance on the first floor, and making some improvements on the first and second floors (Rec., pp. 154, 178.) These improvements were so insignificant that the complainant has not ventured to give their cost.

During the life of the original lessee the lessor herself paid the taxes and collected the amount thereof from the lessee. The correspondence between the parties, showing their course of business in this regard, will be found in the record (pp. 166–168, 197, 276–279).

Henry King, jr., the original lessee, died August 15, 1897 (Rec., p. 2).

He left a will, the contents of which are not relevant to this litigation.

His son, Harry King, was appointed administrator *c. t. a.*, and on August 25, 1897, he filed a petition to the Probate Court asking leave to sell to the complainant the lease in question and also the lease of the Seventh street shop, together with certain stocks of goods, horses, wagons, &c. belonging to the estate of the original lessee, for $3,500 cash (Rec., p. 208). In this petition he averred that this lease was of no practical value, and swore that it had seven years less than its true term to run. Upon this petition a sale was made as prayed, and the complainant became the assignee of the unexpired term of the lease in question.

Within a year the creditors of the lessee filed a creditors' bill against his estate, charging fraud in the dispo-

sition of his assets. On June 24, 1901, an amended bill of complaint was filed (Rec., p. 215), charging fraud and perjury in the sale to the complainant of the lease in question.

On August 12, 1901, Harry King filed an answer (Rec., p. 219) to this amended bill, in which he defended this sale, averring that this and the other leases were of no value and liable to forfeiture (Rec., p. 220). It appears from a stipulation of counsel (Rec., p. 481) that this creditors' bill was heard on bill and answer, and that a decree of sale was made of the assets of Harry King, jr., but not including the lease in question.

After the purchase of these assets from Harry King, administrator *c. t. a.*, a partnership or association was formed between the complainant and her sons for carrying on the same business which the original lessee had conducted, both at the premises in question and also at another shop on Seventh street. The parties interested in this business were the complainant and her sons, Harry King, Joseph King, and Abe King (Rec., pp. 190–196). Of this business Harry King was the manager, the complainant taking little or no part in it (Rec., pp. 187, 194). For years before the death of the original lessee, his son Harry King was his father's general manager (Rec., pp. 184, 193). This history is given for the purpose of showing that Harry King is the real complainant in this case, and that for years prior to his father's death, and from that time on, in the name of Caroline King & Sons, he had managed this business and attended to all of its details. Bearing these facts in mind, we go back to the death of the original lessee in August, 1897.

In November, 1897, a semi-annual instalment of taxes became due, the first to accrue after the assignment of the lease. This tax was paid by check of the complainant to the collector of taxes for $139.34, dated December 30, 1897 (Rec., p. 169). Why the complainant

directly paid this tax is attempted to be explained by the testimony of Joseph King (Rec., p. 154).

> "Q. On this occasion did she (lessor) say anything about him as a tenant—on this occasion in December, 1897? A. Yes, sir; she spoke very highly of him and also said he had always paid his rent prompt and everything.
>
> Q. She spoke of that on this occasion? A. Yes, sir.
>
> Q. What did she say about taxes on that occasion? A. She told me she had neglected to notify us in reference to the taxes, and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to.
>
> Q. Did you notify your brother? A. Yes, sir; I went that night and told my brother, Mr. Harry King.
>
> Q. That is the only occasion you recall that she discussed taxes with you? A. Yes, sir."

If true, this shows Mrs. Kennedy's purpose not to continue the practice which had theretofore prevailed with the original lessee, but to require strict performance of the covenant to pay taxes by the new tenant.

When Joseph King was sworn, it did not appear that he had any direct interest in this controversy. But the testimony of Harry King (Rec., pp. 193–196) disclosed that the complainant and her sons, Harry, Joseph, and Abraham, were all virtual partners in the business carried on upon these premises. The controversy here being between the personal representative of the dead lessor on the one hand and the assignee of the lessee on the other, the surviving party could not testify to any conversation with the deceased (sec. 1064, District Code). While Joseph King was not a party of record, nevertheless the spirit of the rule excludes him from testifying as to any conversation between the deceased lessor and himself. He testified (Rec., p. 154) that a few days be-

fore Christmas, 1897, the lessor came into the premises in question and told him that she had neglected to give notice about the taxes due in November, 1897, and asked him to pay them. He told her in reply that he would notify Harry King and have them attended to. Harry King testified (Rec., p. 168) that when the lessor's request was communicated to him by Joseph King he paid these taxes.

Thereafter no one paid any taxes until July, 1900, when Harry King, of his own motion, sent the witness Rogers to the tax office to make inquiries and pay taxes due (Rec., pp. 126, 171, 188). From December, 1897, to July, 1900, the lessee, through Harry King, entirely neglected the payment of taxes (Rec. pp. 187, 188). It is testified to absolutely by Harry King (Rec., p. 188) that the lessor never wrote to him about these taxes or made any verbal demand upon him for their payment. This is in most marked contrast with her course of business for many years with the original lessee. She always herself paid the taxes, and at once wrote to him for their repayment. During the latter years of his father's life these letters must have come to Harry King as business manager for his father. Yet from December, 1897, when he paid these taxes at the lessor's request, he paid no taxes, made no inquiry, although he must have known that he was not refunding to the lessor any money paid by her for taxes, and took no action until July, 1900, when he awoke to his duty and without suggestion from any one sent to the tax office to pay taxes. When he found that they had not been paid he made no comment to the lessor, but paid them himself. Most significant of all, his bill in this case contains no hint that the tax sale complained of was made because he was deceived by anything that the lessor had done to his prejudice by misleading him in consequence of her own payment of taxes during the life

of the original lessor, although as business manager of his father these facts must have been most familiar to him. In his correspondence with the lessor no complaint is made on this score. It comes as an afterthought when the stress of his case requires it. Only one deduction is justified by those facts, and it is this: that when Mrs. Kennedy visited the shop in December, 1897, and saw Joseph King, she told him that thereafter the lessee would have to pay the taxes in accordance with the covenants of the lease.

During the intervening years from December, 1897, to July, 1901, Harry King was intimately acquainted with tax sales and tax redemptions. Judge Barnard and he were receivers of his father's estate. Their course of dealing with this estate is evident from his testimony. The necessities of the estate compelled frequent defaults and frequent redemptions from tax sales (Rec., pp. 134, 136, 137, 186, 192). See especially Harry King's letters to Wiltsie (a purchaser at tax sales) under date of September 21, 1901 (Rec.. p. 56).

In July, 1900, without suggestion from any one, Harry King apparently awakes to a consciousness of his covenant and sends the witness Rogers to the tax office to pay taxes on this lot. The testimony of Rogers is to the effect that he asked for all back taxes on this lot in July, 1900, and again in May, 1901, and paid all bills that were given him at the tax office. A careful reading of this witness's testimony, involving his self-contradictions and his explicit contradictions by an uncontradicted witness (Miss Lydie Addison, Rec., pp. 452–459), will, we think, satisfy the court that Rogers was not telling the truth and that his testimony must be disregarded. In July, 1900, Rogers paid only the tax for the current year, 1900 (see cheque, Rec., p. 279). But Harry King must then have known that he had paid nothing since December, 1897, and he admits that he knew it (Rec.,

pp. 187, 188), although he says he did not charge his mind with it. His ledger showed that these taxes had not been paid (Rec., pp. 146, 147), and he could not have looked at it without finding out this fact. Nothing further was done until May, 1901, when again Rogers went to the tax office. It was then too late to redeem the sale of April 13, 1899, which had become irredeemable on April 13, 1901 (see tax deed, Rec., pp. 18–20). Rogers then paid $385.39 (Rec., p. 284), which included redemptions from tax sales, save the sale of April 13, 1899, which could not be redeemed.

Nothing further occurred until July 24, 1901, when one Wiltsie, of Rochester, N. Y., wrote to the complainant a letter calling her attention to the fact that he had bought the premises at a tax sale in April, 1899, and that the sale had become irredeemable in April, 1901 (Rec., p. 285).

A careful reading of this letter by the court is requested. The urgency of the case is emphasized by Wiltsie. He writes that unless a reply is made within ten days he will take title to the property. He requests that if Mrs. King is not interested she will give him the name and address of some interested party.

Neither when he got this letter nor at any subsequent time did Harry King make any complaint to the lessor that she had failed to do her duty as to these taxes or had misled him in any way. He concealed from her all knowledge of the sale and of this correspondence with Wiltsie. This correspondence was protracted by Harry King until October 2, 1901. During this time he wrote about this urgent matter three letters, as follows: July 30, 1901 (Rec., p. 173); August 10, 1901 (Rec., p. 174), and September 21, 1901 (Rec., p. 80). This correspondence is set forth in sequence in the appellants' brief (pp. 77–84), and a reading of it will satisfy the court how culpably negligent Harry King was when he had an

opportunity to correct the consequences of his own neglect of covenant duty. Not only would he not do this himself, but he concealed from the lessor the danger of the situation and trifled with this danger while she was ignorant of its existence. Is it credible that he would have then made no complaint to her if her conduct had in any way involved him in the then serious situation?

Now from the inception of this lease down to the end of September, 1901, we have no act of the lessor which in any way misled the lessee or his assignee, the complainant.

The continued defaults in the payment of taxes by Harry King from December, 1897, to July, 1900, were absolutely his own fault.

The failure to redeem from Wiltsie from July 24 to September 30, 1901, was confessedly due to Harry King and to him alone. All of the defendants were entirely ignorant of these transactions between Wiltsie and Harry King (Rec., pp. 47, 61, 67, 80, 81).

This being the case it is not conceived how the subsequent events averred in the bill of complaint can be material or pertinent.

However, they must be considered.

The following admirably succinct account of the subsequent events is borrowed from the brief of Mr. Johnson, attorney for the defendants Cohen and Kann.

On the 19th or 20th of September, 1901, one Charles H. Knight informed the defendant, Louis Kann, of the aforesaid irredeemable tax sale, under the impression that said Kann was the occupant of the property, and said Kann informed Knight he was not the occupant and referred Knight to the defendant, Webb, as the counsel of the owner, Mrs. Kennedy (Rec., pp. 65, 447–8). Subsequently Kann informed his counsel, defendant Cohen, of Knight's visit and communication, but nothing further

was said or done by either the Kanns or Cohen with respect to the tax sale (Rec., pp. 358–9).

At this time Knight was wholly unknown to the defendants, Kann, Cohen, and Webb (Rec., pp. 447–8, 359, 286).

On the 25th of September, Knight called upon Webb and informed him of the tax sale (Rec., pp. 286–7), which information Webb verified the next day, the 26th, by an examination of the tax records, and also discovered that the tax sale had become irredeemable by lapse of time (Rec., p. 287). This was Webb's first knowledge of the fact of the tax default and sale (Rec., p. 293).

On the 26th of September, 1901, after his investigation at the tax office, Webb informed his client, Mrs. Kennedy, of the fact of the tax default and sale and of her legal right to terminate the lease, leaving her to decide upon her course of action (Rec., pp. 79, 287, 348–50, 356).

On the 27th of September, 1901, which was a Friday (Rec., p. 287), being about to leave the city, and not having previously cautioned his client not to receive rent if she decided to enforce the forfeiture, Webb wrote her to that effect (Rec., pp. 287, 307, 348). He then went to New York (Rec., pp. 287, 348) and returned to his office on Monday morning, September 30, 1901 (Rec., pp. 287, 348), and found there a letter from Mrs. Kennedy, dated Sunday evening (Rec., pp. 287, 307, 308, 348).

That letter concludes thus:

> "You say I must not receive the rent, which he will probably send me by mail on Tuesday morning—but I don't see how I can refuse it unless I know when I am to get another tenant" (Rec., p. 308).

Webb understood this as an instruction from his client to seek another tenant in the place of the Kings (Rec.,

pp. 80, 308–9, 350), and that same morning called upon the defendant Cohen, the counsel of the Kanns, to inquire if the Kanns would rent the property (Rec., p. 287), the Kanns having previously, in June, 1901, intimated a willingness to rent the property at $300 per month (Rec , pp. 287–8, 305–6). At this interview Webb informed Cohen that the Kings had failed to pay the taxes, and that the consequent forfeiture of the lease was to be enforced by his client, Mrs. Kennedy (Rec., pp. 311, 360).

Cohen thereafter conferred with his clients by telephone (Rec., p. 360), and about 1 o'clock the same day informed Webb of the Kanns' reply, that they would agree to take the property at the higher rental, provided possession were given and their agreement would not be used to compel the Kings to pay a higher rent (Rec., pp. 287, 311–12, 350–1, 360–1).

At this interview Webb, in course of conversation, informed Cohen that Wiltsie was the purchaser at the tax sale and that the sale had become irredeemable by lapse of time (Rec., pp. 95, 360, 361). Cohen then suggested to Webb, that he, Webb, buy the tax sale certificate from Wiltsie, to which Webb replied there was no necessity for his, Webb's, purchasing it, whereupon Cohen jestingly remarked, "I believe I'll buy it," and Webb responded, "Don't do that ; don't add that complication," or words to that effect (Rec., pp. 95, 328–9, 360–1). At this time Cohen had no idea of buying the tax sale certificate, and his remark was made entirely in jest (Rec., p. 361).

The same day, about 4.30 p. m., Webb informed his client, Mrs. Kennedy, of the willingness of the Kanns to rent the property upon the terms reported by Cohen, and advised her to enforce the forfeiture (Rec., pp. 288, 311, 348). Mrs. Kennedy acquiesced in this advice, and instructed Webb to inform her physician and friend, Dr. Fry, thereof, and of her decision to enforce the forfeiture,

which instructions Webb carried out that same afternoon (Rec., pp. 80, 324).

In the meantime, upon consideration, the idea of buying the tax sale certificate, which Cohen had, in jest, suggested to Webb he would do, impressed him more favorably, and between 3 and 4 o'clock that afternoon he had a conference with the Kanns, in which he suggested that they allow him to buy the tax sale certificate and hold it for their benefit. After consideration of the matter, the Kanns left it to Cohen's discretion to purchase the tax sale certificate or not, agreeing to furnish the necessary funds and to stand by the transaction, should he so decide (Rec., pp. 43, 44, 66, 67, 361, 362).

After leaving Dr. Fry's house (Rec., p. 324), Webb went to his own home, reaching there about 6 o'clock, and found the defendant Cohen and his partner, Adolph G. Wolf, on his doorstep awaiting admission (Rec., pp. 288, 312, 324, 364).

Cohen then informed Webb that he, Cohen, was going that night to Rochester to purchase the tax sale certificate from Wiltsie, saying that they were then dealing at arm's length (Rec., pp. 288, 324). Webb expostulated with him, but Cohen was positive and insisted upon going and executing his project (Rec., pp. 312, 313, 324, 325, 364).

Cohen left by the midnight train, arriving in New York the next morning, October 1, 1901, and reaching Rochester at about 3.20 p. m. the same day (Rec., pp. 366–7). The same day, October 1, 1901, Mrs. Kennedy, in execution of the advice previously given by her counsel, the defendant Webb, wrote and sent her notice to the Kings, refusing the rent sent by the Kings on the 30th of September and announcing the forfeiture of the lease (Rec., pp. 7, 20, 176, 177).

The letter is as follows:

"*1630 R. I. Ave., Oct. 1, 1901.*

"To Mrs. H. King, Jr.:

"I have only learned within the last few days that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes and allowing the property to be twice sold at tax sales.

"The lease being thus vitiated, and by advice of my attorney, I must decline receiving any further rental from you.

"For fuller explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

"M. A. B. Kennedy" (Rec., p. 177).

Upon receipt of this letter, on the morning of October 2, 1901, before banking hours, Harry King consulted his counsel about it (Rec., p. 178), then called upon Webb and after some conversation on the subject asked Webb if he objected to his going to see Mrs. Kennedy. Upon being informed by Webb that he did object and that King must transact his business with him, Webb, King says he told Webb he would go to Mrs. Kennedy and did go to her house and attempt to see her, but she denied herself to him (Rec., pp. 179–80).

At 2 o'clock p. m. of the same day, October 2, Cohen received at Rochester the tax certificate from Wiltsie's clerk assigned to himself (Rec., pp. 18, 369) and left at 2.30 p. m. for Washington by way of New York City, arriving here the morning of October 3 (Rec., p. 369). The same day a deed was executed by the authorities of the District conveying the property to Cohen and was at once recorded (Rec., pp. 18–20, 370).

Between the 24th of July, 1901, and the 30th of September, 1901, the correspondence already referred to had taken place between the Kings and Wiltsie with respect to the tax default, but of which all the defendants were entirely ignorant (Rec., pp. 47, 61, 67, 80, 81).

It will be recollected that on the 24th of Septem-

ber, 1901, Wiltsie's clerk wrote, offering to settle at a reduction of $25, concluding thus:

> "Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination, and payment can be made. Please call at the bank *upon receipt of this letter and take up the papers promptly*" (Rec., pp. 175–6).

King did not reply to this letter nor do anything in pursuance of it (Rec., p. 176), until October 2, 1901, *after* he received Mrs. Kennedy's letter of the 1st notifying him that she had terminated the lease because of the Kings' failure to pay the taxes, and of their allowing the property to be sold at tax sale (Rec., p. 177).

He then attempted to take up the tax sale certificate by payment at the bank, but it was too late, as the certificate had been returned to Wiltsie the day before (Rec., p. 179).

The first knowledge that defendant Cohen had of the fact that this tax sale certificate had been sent to Washington for redemption, or that the Kings had had any opportunity to redeem it, was when he was informed by Wiltsie, in Rochester, on the afternoon of October 1, 1901 (Rec., pp. 47, 61, 368–9), and was not known to defendant Webb until after the 3d of October, 1901 (Rec., pp. 80, 81, 332).

On October 4, 1901, Mrs. Kennedy executed and had served upon Caroline King a formal notice to quit and surrender up possession of the property (Rec., pp. 349–350, 353, 474–5).

Between the 2d and 8th of October, 1901, the complainant, through her son and counsel, endeavored to effect a compromise settlement of the forfeiture incurred by which the forfeiture would be waived and the lease maintained, but without success (Rec., pp. 179–80, 21).

On the 9th of October the defendants Kann, through their counsel, informed the defendant Webb, as counsel for Mrs. Kennedy, of their ownership of the tax title in hostility to her, and offered to compromise the same and surrender the tax title if his client would give them possession of the property under a long lease, for which they would pay a net increase rental of $1,200 per annum over that fixed by the forfeited lease; that otherwise they would stand upon their legal rights under the tax title, which she must attack at her peril (Rec., pp. 291–2, 318, 372).

Webb submitted this proposition to Mrs. Kennedy and she accepted it, which fact Webb communicated to counsel for the Kanns on the 10th of October (Rec., pp. 319, 320, 326, 373).

Nevertheless, the Kings, through their counsel, made further efforts, principally by correspondence, with the defendant Webb, to effect a compromise of the forfeiture of the lease, beginning on the 12th of October (Rec., pp. 22–3) and extending to the 30th of October (Rec., pp. 22, 86–89, 294–5, 428–9). As shown by the correspondence itself, no basis of agreement was reached, and the matter culminated on November 1, 1901, in the withdrawal, by counsel for the Kings, of their previous proposition, the rejection of that tendered by defendant Webb, and their declination to enter into any compromise (Rec., pp. 89–91).

On November 9th Mrs. Kennedy signed and duly executed, before Rutledge Wilson, a notary, the complaint in a landlord and tenant proceeding against Caroline King for possession of the leased premises, which was duly filed by defendant Webb, and a summons issued the same day (Rec., pp. 24–5, 349, 353).

The trial of this proceeding was fixed for the 5th of December, 1901 (Rec., p. 10), and on the 4th of December, 1901, the original bill in this cause was filed by Caroline King against Mrs. Kennedy, the Kanns, and Cohen (Rec.,

p. 1), and a temporary restraining order issued (Rec., p. 25). On the same day Mrs. Kennedy died (Rec., p. 27), and on March 7, 1902, a bill of revivor was filed reviving the cause against her executor, the defendant Webb, and against Maria Gillis Dewey, her alleged heir at law (Rec., pp. 26–29). On the 4th of April, 1902, a supplemental bill was filed (Rec., pp. 29–31).

The bill of revivor and the supplemental bill are merely formal, to meet the requirements of equity practice, and involved no change in the case made by the original bill.

All the defendants answered and the cause came on for hearing on the pleadings, on complainant's motion for injunction *pendente lite*, and on June 28, 1902, an injunction *pendente lite* was granted against the defendant Webb (Rec., p. 106). From this order the defendant Webb appealed to the Court of Appeals of the District of Columbia (Rec., p. 108), and said order was, by that court, affirmed on January 20, 1903 (Rec., pp. 112–13). Thereafter the testimony of the parties was taken, and on June 30, 1904, the cause came on for hearing upon the pleadings and evidence, and the final decree was entered, from which appeals were successively prosecuted to the said Court of Appeals and to this Honorable Court (Rec., pp. 482–4).

Discussion of Legal Questions.

1. *Will a court of equity relieve against a forfeiture incurred by tenant's breach of covenant to pay taxes where, in consequence of the breach, a third party has acquired title at tax sale?*

We will postpone a consideration of the question of relief granted by courts of equity in cases of fraud, accident, or mistake. In England forfeitures for non-payment of rent were formerly granted by courts of law, as well as by courts of equity. Since the Act of 4 George II,

abridging the powers of law courts in this respect, relief has been granted in equity mainly. Relief was granted in this case because legal interest is generally full compensation for the mere withholding of money due. But when you pass this line you get beyond the relief, because the law can not estimate the damage of a breach. When we turn from covenants to pay rent to covenants to repair, not to assign, to pay taxes, and to insure (to mention the more important only), we see at once the difference in consequences resulting in a breach from any of them as contrasted with a covenant to pay rent. You have a right to refuse to lease your property to a tenant unless he covenants to insure, or to pay taxes, or to repair, or not to assign. If he violates this covenant you lose the benefit of it, and the consideration of your contract is, in part, gone. If you hire a domestic servant and he steals from you, the law gives you the right to terminate the contract of service. Because he pays back to you the money he has stolen, he does not for that reason acquire a right to have you retain him for the balance of the stipulated term. The law does not force you to retain in your service a dishonest servant. Neither does it force you to retain a dangerous tenant.

If a tenant does not pay you rent, he merely deprives you of the use of money. Interest is legal compensation for this delay. But if he does not insure your house, you are in danger of losing that house through fire. If he does not pay your taxes you are in danger of losing not only your house, but your ground too. It is true that your house may not have burned down. It is true that your land may not have been in fact sold for taxes, or it may have been sold, yet the particular tax sale may be invalid. The next one, however, may be valid. It is not right that you should be forced to keep the tenant who has exposed you to this danger and to run the risk of his exposing you to future dangers from similar breaches.

The law in England upon this point is well settled. It is discussed in the brief (pp. 16–48). The leading English case on the subject is that of—

Rolfe *vs.* Harris, 2 Pri., 206 (220) n.

This case has been followed in—

White *vs.* Warner, 2 Merivale, 459.
Green *vs.* Bridges, 4 Simmons, 96.
Reynolds *vs.* Pitt, 19 Ves., 134.
DeScarlett *vs.* Denett, 9 Mod., 22.
Wafer *vs.* Mocatto, 9 Mod., 112.
Wadman *vs.* Calcraft, 10 Ves., 67.
Hill *vs.* Barclay, 18 Ves., 63.
Bracebridge *vs.* Buckley, 2 Pri., 200.

The only confusion that exists with respect to the general doctrine was introduced by Lord Erskine's decision in the case of Sanders *vs.* Pope, 12 Ves., 282. This case, however, was overruled in the case of Bracebridge *vs.* Buckley (supra). In Bigelow's "Overruled Cases" it is included in the list as having been denied in the case of Swanton *vs.* Biggs, 2 Molloy, 14–16. In the note to the report of Sanders *vs.* Pope, 12 Ves., 294, the reporter says:

> "That the authority of the principal case has been very much shaken, see ante, note 2, to Eaton *vs.* Lyon, 3 Ves., 690. See, also, the notes to Williams *vs.* Cheney, 3 Ves., 59; and the note to Wadman *vs.* Calcraft, 10 Ves., 67."

The case of Sheets *vs.* Selden, 7 Wall., 416–422, decides that the English rule upon the subject is settled by the case of Bracebridge *vs.* Buckley. While in this case of Sheets *vs.* Selden, it is said that the general question is unsettled in the jurisprudence of this country; never-

theless, that case would seem to settle it for this court. At page 421 the court say:

> "The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced, if such is the remedy provided by the contract. The rule is applied to the covenant to repair, to insure, and not to assign."

In this country the case of Bacon *vs.* Park, 19 Utah Rep., 46, is directly in point. In that case, as in the case at bar, there had been a sale for non-payment of taxes which the tenant had covenanted to pay. The sale, however, had not culminated in an adverse tax title. The court say:

> "The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenant of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd*

> *for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale.* Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

The case of Baldwin *vs.* Reese, et al., printed as Appendix B to the main brief, and decided by Judges Force, Harmon, and Foraker, holding the Superior Court of Cincinnati, and reported in American Law Record, vol. 8, 496, is also directly in point upon the direct question here concerned. The court said:

> "The defendant (tenant) is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes, in violation of the covenant, does not give a right to call for an account. It is his business to know. But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; *it puts in jeopardy the estate of the lessor, and equity does not relieve against such a forfeiture.*"

Certain cases cited on the other side are considered in full in the appellant's main brief (pp. 35–38). These cases all rest upon the decision of the Superior Court of the city of New York in the case of Garner *vs.* Hannah, 6 Duer., 262. Many of these cases also rest upon the English overruled case of Sanders *vs.* Pope (supra). Neither the main case of Garner *vs.* Hannah nor any of the other cases consider at all the radical difference between a covenant to pay rent and a covenant to pay taxes. None of them are reasoned, and they can not be considered as anything more than sentimental decisions

INSERT.

After the brief and argument of the appellant Webb had been printed and filed, his counsel received in due course of publication the advance sheets No. 6 of Volume LXIX of the Lawyers' Reports Annotated. At page 833 will be found a note covering the whole subject of forfeiture, to which counsel respectfully refer the court. They desire to especially call the attention of the court to the case of Gordon *vs.* Richardson, 185 Mass., 492, which is directly in point. The Supreme Court of Judicature of Massachusetts, in a unanimous opinion, declined to follow the decision of the Court of Appeals of the State of New York in the case of Giles *vs.* Austin (supra). In the opinion the English cases of Peachy *vs.* Duke of Somerset (supra); Hill *vs.* Barclay (supra); Reynolds *vs.* Pitt (supra); Bracebridge *vs.* Buckley (supra), and Green *vs.* Bridges (supra), are cited and approved. The court in their opinion point out that the breach of a covenant to pay rent is a very different thing from the breach of a covenant to pay taxes. At page 493, the court say:

> "In this case the defendant entered for breach of the covenant to pay taxes, as well as for breach of the covenant to pay rent. When he exercised his right of reentry, in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question, secured by the right of reentry, not only has not been performed, but it can not be performed now. The tax for 1900 has been paid and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of reentry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.*
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> "Moreover if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance the plaintiff would gain nothing. *If you look beyond its terms, the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate.* When the breach of the covenant has reached the stage where the land-

lord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, *we have a breach of covenant for which the plaintiff fails to show that compensation can be made. It is like the breach of a covenant to insure or repair* where equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

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"But that view did not prevail. It is settled that in case of waste (Peachy *vs.* Somerset, 1 Stra., 447), in case of a breach of a covenant to make repairs (Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56; Bracebridge *vs.* Buckley, 2 Price, 200), and in case of the breach of a covenant to insure (Reynolds *vs.* Pitt, 19 Ves., 134, Green *vs.* Bridges, 4 Sim., 96), it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J., had in mind in Lundin *vs.* Schoeffel, 167 Mass., 465, 469, when he said of the case then before the court that it 'was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance."

It appears from the note already referred to (69 L. R. A., pp. 833–865) that although the mere declaration of the forfeiture will not of itself destroy the power of equity to afford relief (in cases of accident, etc.), yet that is an important step towards the assertion of the rights of the obligee, and where he has taken the necessary steps to reassert his title at law, the obligor must make a stronger case to entitle himself to relief.

The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the

determined to relieve against forfeiture at the expense of well settled principles of law and fundamental rights of contract.

As opposed to the lax utterances of these cases on the general principles of the law of forfeiture, reference is made in the main brief to the following cases, and at pages 39 to 48 of that brief they are fully considered:

Clark *vs.* Barnard, 108 U. S., 436.
Klein *vs.* Insurance Co., 104 U. S., 88.
Thompson *vs.* Insurance Co., 104 U. S., 252.
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Skinner *vs.* Dayton, 2 Johns. Ch., 526.
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Dunklee *vs.* Adams, Adm., 20 Vermont, 415.
The Ottawa Northern Plank Road Company *vs.* Murray, 15 Ill., 336.
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Hukill *vs.* Guffey, 37 W. Va., 425.
People's Bank *vs.* Mitchell, 73 N. Y., 406.
Parsons *vs.* Smilie, 97 Cal., 647.

Counsel confidently contend that upon this first point they are overwhelmingly supported by reason and authority.

2. *Is such breach one that can be compensated to a landlord?*

This question is considered in the main brief at pages 48 to 57. Reference is made to the following cases:

Hand *vs.* Suravitz, 148 Penna. St., 202,
Rector, etc., of Trinity Church *vs.* Higgins, 48 N. Y., 532.

equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

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The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the case at bar the bill is filed by the tenant to enjoin proceedings at law by the landlord to regain possession of the demised premises after a forfeiture declared by the landlord. It will be noted in the case of Gordon *vs.* Richardson that the case of Sanders *vs.* Pope (supra), is referred to as having been overruled.

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Hand *vs.* Suravitz, 148 Penna. St., 202,
Rector, etc., of Trinity Church *vs.* Higgins, 48 N. Y., 532.

And also the following English cases:

Hill *vs.* Barclay (supra).
Rolfe *vs.* Harris (supra).
Green *vs.* Bridges (supra.
Reynolds *vs.* Pitt (supra).
Bracebridge *vs.* Buckley (supra).

It appears from these cases that in such a case as the one at bar the covenant of the tenant to pay the taxes is recognized as giving to the landlord a contract right which he can not be deprived of, and for the non-fulfilment of which compensation in a legal sense can not be made to him. In the Pennsylvania case the court say:

> "In the case in hand the defendant distinctly agreed that his lease might be forfeited for such non-payment (of water rent). He could have avoided it by paying the bills."

In the New York case (Trinity Church) the court say:

> "The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs. Let them first pay it and I will repay them. It is his own debt, made so by the terms of his covenant. . . . It was, doubtless, to guard against the contingency of a sale of the premises by the city corporation, to obtain payment of the sums assessed, that the covenant was inserted in the lease. *The sale of the premises would involve a loss of the security for the rent reserved, and probably of the reversion.*"

In the case of Hill *vs.* Barclay (supra), Lord Eldon said:

> "It is sufficient that the lessor insists upon his covenant, *and no one has a right to put him in a different situation.*"

In the same case Lord Eldon said, in answer to a suggestion that the lessor was no worse off by reason of the breach of a covenant to repair if the repairs were, in fact, made before the close of the term:

> "*The court is surely not authorized so to deal with contracts.*"

In the case of Rolfe *vs.* Harris (supra) Vice-Chancellor Plumer said:

> "In this very sort of case, too, how can we, when a risk has been run, estimate the *quantum* of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer for want of power to enforce his covenant."

In the case of Green v. Bridges (supra), Vice-Chancellor Shadwell said, with respect to a breach of covenant to insure:

> "In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be under the covenant."

In the case of Reynolds *vs.* Pitt (supra), Lord Eldon said:

> "Upon what principle is a court of equity to say that a tenant who has so neglected to fulfil his contract shall insist that the landlord shall keep all the terms with him as if he had duly performed it?"

In the case of Bracebridge *vs.* Buckley (supra), Richards, baron, said:

> "If not done within the given time the contract is not performed. The lessor can not call on this court to compel the lessee to perform the con-

tract; and why should the lessee call on the lessor to forego it?"

Thompson, chief baron, said in the same case:

"It really comes to a question whether, in all cases of reentry on breach of covenant, a court of equity will do away with the covenant."

3. *Must the landlord in such case make any demand upon the tenant before declaring a forfeiture, and, if so, for what?*

The doctrine of the law is that where a demand would be useless it is not necessary.

Heard *vs.* Lodge, 20 Pick., 53.
Wilstach *vs.* Hawkins, 14 Ind., 541.

The covenant in question was to pay the taxes. When the lessor first learned in the case at bar of a breach, not only had the taxes not been paid, but a tax sale had been made and had become irredeemable. Therefore, a demand on the tenant to pay the taxes would have been useless. But there was no necessity for a demand. Even with respect to the demand for rent, the only reason why this was necessary was because a distress could be justified only by a demand.

Davis *vs.* Burrell et al., 10 C. B., 822.

It has been explicitly decided in the following cases that no demand is necessary for the performance of a collateral covenant:

Bracebridge *vs.* Buckley (supra).
Rolfe *vs.* Harris (supra).
Green *vs.* Bridges (supra).
Baldwin *vs.* Rees (supra).
Bacon *vs.* Park (supra).
Byrane *vs.* Rogers, 8 Minn., 247,
Garner *vs.* Hannah (supra).

The main case upon which opposing counsel rely is that of Jackson *vs.* Harrison, 17 Johnson, 66, decided in 1819. In this case there is no citation of authority or discussion of principle, and the court evidently confused demand for rent with demand for collateral covenants. This case of Jackson *vs.* Harrison was expressly disapproved in the year 1857 in the case of Garner *vs.* Hannah (supra).

The case of Meni *vs.* Rathbone, 21 Ind., 454, rests upon the same case of Jackson *vs.* Harrison. The case of Eichenlaub et al. *vs.* Neill, 3 Ohio Dec., 365, reviews a large number of decisions and concludes that the cases above referred to can not be held to settle the question in this country as to the necessity for a demand.

The *dictum* of Mr. Justice Miller, in the case of Kansas City Elevator Company *vs.* Union Pacific Railroad Company, 3 McCreary, 463, was without citation of authority and was apparently, from his own language, very hasty. This subject is discussed in the main brief at pages 57 to 65, and we think that it is very conclusively shown, both upon reason and authority, that no necessity for a demand exists.

4. *Such a covenant imposes upon the tenant the duty of paying the taxes as they become due.*

Rector, etc. *vs.* Higgins (supra).
Hand *vs.* Suravitz, 148 Pa. St., 207 (supra).
McFarlane *vs.* Williams, 107 Ill., 42.
Ricou *vs.* Hart, 47 La. Ann., p. 1373.
Allen *vs.* Dent, 72 Tenn., 680.

5. *The effect of the action of the lessee in herself paying the taxes down to a certain date is considered in the brief at pages 68 to 84.*

This question has already been considered in the argument upon the facts. In this connection counsel call

attention to the case of Thompson *vs.* Insurance Co., 104 U. S., 252. The question is one of fact mainly, and has already been discussed. It may be concisely resumed as follows:

1. While the lessor during the original lessee's life herself paid taxes on the premises, she regularly collected them through letters to the original lessee.

2. She stopped this when the original lessee died in August, 1897, and thereafter paid no taxes, although she did not die until December, 1901. During all those years there was not a single letter written by her to the complainant asking a refund of taxes. There can be no doubt that when the lessor in December, 1897, had a conversation with Joseph King, she told him that thereafter the tenant must pay the taxes direct. The tenant did pay the taxes direct in December, 1897. Harry King's testimony (Rec., 187–188), shows conclusively that he knew that he was expected to pay the taxes. He voluntarily and of his own motion sent to pay them in July, 1900, and again in May, 1901. His own ledger shows that they were not paid between December, 1897, and July, 1900. He had received no demands during that time from the lessor for reimbursement for taxes paid by her, although prior to that her written demands were regular. When he learned in July, 1900, that the taxes had not been paid, he made no comment upon it to her. When in May, 1901, he had redeemed and paid heavy penalties for tax sales, he again made no comment or complaint to her. When in July, 1901, he learned from Wiltsie that he had to redeem a tax sale made in April, 1899, and while he was wasting two months in haggling over a small sum of money with Wiltsie, he again made no complaint to the lessor. When he filed his bill in December, 1901, no reference was made to the subject, although the whole matter had been thus repeatedly called to his attention and was absolutely within his own knowledge. In addition to that,

it appears that Harry King, during these years, had made defaults in the payment of taxes upon other property belonging to his father's estate, and had had to redeem tax sales from this very man Wiltsie, so that he was thoroughly conversant with these matters, and was, moreover, negligent with respect to them, either from inattention or want of pecuniary means. Moreover, the correspondence with Wiltsie set forth in the brief, at pages 76 to 84, showed his method of dealing with this subject after it had come to his knowledge that the property had been sold for taxes and that the sale had become irredeemable. In the meantime, during his negotiations with Wiltsie, he was not only making no complaint to the lessor, but was keeping her in absolute ignorance of the dangerous situation.

6. *The complainant has been lacking in diligence.*

How little diligent in the premises the complainant has been appears from the testimony next hereinbefore referred to, showing that she not only neglected her covenant duty for more than two years, but also was most negligent in attempting to repair, as far as she could, the very dangerous consequences of that prior negligence.

7 and 8. *Was the Court of Appeals right in allowing the complainant to litigate with the holder of the tax title the validity of that title at the risk of the lessor?*

In the case at bar, when the lessor discovered the injury that had been done, she made a compromise with the holder of the tax title through which the purchaser of the tax title (the Kanns) were to release to her the tax title. They were also to take a lease upon the premises at an advance of $1,200 per year in addition

to the other obligations assumed by the original lessee. The Court of Appeals has said that in such a case a court of equity can enjoin the lessor from making such a compromise, can further enjoin him from recovering possession at law of the demised premises from the defaulting lessee, and can thus deprive him of the benefit of the contract of compromise, and that it can further, at the risk of the lessor, inquire into the validity of the tax deed and adjudicate thereupon. It has not in either of its opinions cited a single authority authorizing such a proceeding, and it is believed that none can be cited. The result of the opinions of the Court of Appeals is that a defaulting tenant, who has done all the mischief, can defy the landlord, from whom he received possession, and thus can prevent the landlord from regaining possession and with it saving himself from the ruin brought upon him by the tenant on the ground that the landlord has lost title and right of possession through the tenant's own act. With great respect for the Court of Appeals, it is urged that this can not be the law. The authority of Bacon *vs.* Park (supra) is very pertinent in this connection.

9. Question nine is considered in the main brief at pages 91 to 96, and is mainly one of fact, which has been already hereinbefore adverted to.

10. *Question ten involves the matter of alleged fraud, accident or mistake on the part of the complainant as a ground of equitable relief.*

Its discussion occupies pages 96 to 186 of the main brief. This subject can only be reviewed in the limited time allowed for oral argument in the most hurried way. Reference will be made to the leading authorities upon the subject of accident and mistake. The leading English case upon the subject is that of Duke of Beaufort *vs.* Neeld et al., 12 Cl. & F., 248. In two subsequent cases

this leading case has been considered and affirmed by the court of appeals and the supreme court of judicature. One of these is the case of Barrows *vs.* Isaacs, 1 Q. B. D. (1891), 417. The second is that of Eastern Telegraph Co. *vs.* Dent, 1 Q. B. D. (1899), 835, decided in the year 1899. Attention is especially directed to the utterances in the last of these cases quoted at page 127 of the main brief. American authorities in point are those of Grimes *vs.* Sanders et al., 93 U. S., 55; Kinney *vs.* The Con. Va. Mining Co., 4 Sawyer, 382; Hunt *vs.* Hardwicke & Co., 68 Ga., 100; The Township of Churchill *vs.* The Township of Cummings, 51 Mich., 446; and Persinger *vs.* Chapman, 93 Va., 349, 352.

The main brief considers in detail at pages 131 to 141 certain American cases in which relief was granted on the ground of accident or mistake and contends that none of these cases justify the decree of the Court of Appeals in the case at bar. Reference must be made to the main brief for this discussion, as time will not permit it to be had in oral argument, and it can not be effectively condensed.

Even, however, should the court be of opinion that the repeated defaults made from December, 1897, to July, 1900, could be excused, yet when the action of Harry King from July, 1901, to October, 1901, is considered, it is submitted that there is no possible ground upon which resort can be had to relief by reason of accident or mistake.

Upon the question of fraud there is a discussion in the brief beginning at page 148 and continued to page 186. It is sufficient to say upon this head that in the pleadings, and in the evidence the charge of fraud and collusion between Webb and Cohen and the Kanns, made in the correspondence of counsel for the complainant, and reiterated in the bill, is not only not proved, but not attempted to be proved. It is denied absolutely by the only per-

sons who could have any knowledge thereof, and there is not one word of proof to overcome this denial. This is a wanton charge made in the exigencies of the complainant's case and should not have been made. Under the leading cases of Price *vs.* Berrington, 7 English Law and Equity, 254; Eyre et al. *vs.* Potter, et al., 15 How., 42; and Warner *vs.* Godfrey, 186 U. S., 365, these groundless charges should not receive favorable consideration and upon failure to prove them, the appeal should be dismissed without reference to secondary grounds of relief. It will be noted in connection with the charges of fraud and duress, which are also discussed at the indicated pages of the main brief, that the position of the complaintant is not consistent. It appears that while the Kanns, through their attorney Cohen, were urging upon the lessor a line of action favorable to their interests, Harry King and his attorney were equally busy in urging the opposite line of action. There was no more duress on the one side than on the other, nor was there duress on either. The lessor was threatened with inevitable litigation on the one side or the other. On the advice of her counsel she choose that line of action which she thought most advantageous to her.

So with respect to the charge of fraud and collusion, in one breath it is urged that Cohen did everything in hostility to Webb—he gave Webb but short notice of the visit to Rochester and that at a time, it is said, when Webb could not get money to follow him or to buy the outstanding tax title over his head. He went at an hour when the court could not enjoin him from going or when a writ of *ne exeat* could not have been used against him. All these matters are suggested in one breath. In another it is argued that Webb's expostulations with Cohen with respect to going to Rochester and buying the

tax title, and his conversations with him were simply by-play and childish, and that the whole thing was merely a dumb show, and that they were really in collusion. Now either of these arguments may be made, although absolutely without support from the testimony, but both of them can not be made consistently.

11. This question relates to *laches* and has already been sufficiently adverted to.

12. Assuming that counsel for the appellants fail entirely to convince the court that the complainant is not entitled to relief, then she should have relief only on the condition of paying all costs and reasonable counsel fees to the landlord, incurred in resisting such relief. This position seems reasonable and in addition is supported by the authority of Eichenlaub *vs.* Neil, (supra). Counsel for the appellant desire, however, to reiterate that to give relief in the case at bar is to do violence to the law.

As Chief Baron Thompson said in Bracebridge *vs.* Buckley (supra):

> *"It really comes to a question whether, in all cases of reentry on breach of covenant, a court of equity will do away with the covenant."*

As Lord Campbell said in Duke of Beaufort *vs.* Neeld (supra):

> *"It would be a disgrace to the law if there could have been such a decision."*

As Lord Justice Smith said in Eastern Telegraph Co. *vs.* Dent (supra):

> *"I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for and render it of no effect."*

As Lord Justice Ray said in Barrows *vs.* Isaacs (supra):

> "*It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore.*"

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed on every assignment of error.

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